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In the Supreme Court of the United States

OCTOBER TERM, 1979

NORTHFIELD CHEESE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board's finding that petitioner failed to bargain in good faith is supported by substantial evidence.

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OPINIONS BELOW

The court of appeals did not issue an opinion. The order of the court of appeals (Pet. App. A-1 to A-3) is unreported. The decision and order of the National Labor Relations Board (Pet. App. A-4 to A-47) is reported at 242 N.L.R.B. No. 157.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-1 to A-2) was entered on March 21, 1980, and a petition for rehearing was denied on April 16, 1980. The petition for a writ of certiorari was filed on May 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. 2-3).

STATEMENT

1. Petitioner Company's production and maintenance employees have been represented by the Union[1] since approximately 1957. The last of a series of collective bargaining agreements expired on April 30, 1977 (Pet. App. A-9).

Prior to the expiration date, the parties held three bargaining sessions, on April 20, 22 and 28, 1977. The Company was represented at these sessions only by its president, Mark Robbins (Pet. App. A-10). By the end of the April 28 session, the parties had reached agreement on virtually all issues except wages and the Union's proposed

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[1]Meat, Food & Allied Workers, Local P-653, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO.

welfare program (Pet. App. A-10 to A-11). The difference in the parties' proposed wage increases over a three-year contract had been reduced from $1.40 to 71 cents. The Union had twice reduced its opening proposal, resulting in a decrease from $1.70 to $1.16. The Company had raised its opening proposal by 15 cents, to a total of a 45-cent increase over three years (Pet. App. A-11 to A-12). With respect to the welfare program, the Union had decreased its demand significantly (Pet. App. A-10). At the Union's suggestion, the parties agreed to call in the Federal Mediation and Conciliation Service (FMCS) at the next meeting scheduled for May 6, 1977, to resolve the remaining issues (Pet. 6; Pet. App. A-12). Robbins then suggested extending the contract beyond its expiration date and making any negotiated wage increases retroactive to May 1, 1977. The Union agreed, and Robbins said that he would check with the Company's attorney and let the Union know on Monday, May 2 (Pet. App. A-12).

During the late afternoon of May 2, Company attorney Joseph Carey advised Robbins not to agree to extend the contract or to pay retroactive increases (Pet. App. A-18). When the Union was so informed on Tuesday, May 3, all of the employees went out on strike (Pet. App. A-19). Thereafter, the Company, adopting the "severe [negotiating] tactic" suggested by its attorney, completely changed its bargaining posture (Pet. App. A-20 to A-22; A. 472, 594-596).[2]

Thus, at the next bargaining session, held on May 6, 1977, in the FMCS offices (the first bargaining session attended by Attorney Carey (Pet. App. A-20)), Robbins, reading from a prepared statement, announced that the Company was not able to pay the 15-cent per year (for

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[2] "A." references are to the joint appendix filed in the court of appeals.

three years) wage increase it had proposed on April 28 and was withdrawing all of the proposals it had made on April 28 (Pet. App. A-20; A. 112, 240-241, 295-296, 345). Robbins said the Company would agree only to continuing for one year the provisions of the old contract, including the old wage rates. Moreover, Robbins said, the existing union security and checkoff clauses would have to be omitted (Pet. App. A-20; A. 113, 241, 295-296, 353, 782). This was the first time in the 20-year history of bargaining between the Company and the Union that the Company had proposed the elimination of the union security and dues checkoff clauses (Pet. App. A-16).

Despite various Union counterproposals (Pet. App. A-20 to A-21; A. 114-115), the Company continued to withhold any offer of a wage increase and declined to reinstate any of its prestrike tentative agreements with the Union during the three succeeding bargaining sessions held before the strike was terminated on August 12, 1977 (Pet. App. A-22).[3] At the first bargaining session after the

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[3]Earlier, on July 15, the Union had made an unconditional offer to return to work, requesting reinstatement of the strikers. The Company had rejected the Union's offer to return to work, informing the Union on July 19 that all of the striking employees had been permanently replaced (Pet. App. A-27 to A-28). In fact, only about 15 or 16 strike replacements had been hired by July 15 (in a prestrike unit of 39 (Pet. App. A-9)), one was hired on July 18, and four more were hired by August 11 (Pet. App. A-28 to A-29). At the August 12 session, Robbins told the Union that the Company had "no responsibility" to reinstate the striking employees "[e]ven as vacancies became available," because, he claimed, they had all been permanently replaced (Pet. App. A-29 to A-30). Immediately after this session, the Union sent the Company a mailgram terminating the strike. The Company did not offer to reinstate any former strikers until September 1, 1977. Thereafter, the Company gradually made offers of reinstatement to former strikers (11 in September, 5 in October, 9 in November, 2 in December and 1 in January 1978) (Pet. App. A-30 to A-31).

conclusion of the strike, held on September 2, 1977, the Company reinstated its prestrike proposals, including its proposal for a three-year agreement, except that it reduced the proposed annual wage increase of 15 cents first to 10 and then to 12 cents. The Company modified its opposition to union security, stating that it opposed compulsory membership and checkoff only for the first twelve months of the agreement (it subsequently reduced the time to the first six months) (Pet. App. A-23 to A-25). However, the Company insisted that the strike replacements be permanently exempt from a union security clause. Robbins explained that he had given "his word to each one of the people that was hired during the strike and told them that they would never have to belong to a union or pay union dues" (Pet. App. A-24 to A-25).[4] The Union continued to seek union shop and checkoff provisions, effective upon the signing of an agreement, although it was willing to delay for a month the application of those provisions to strike replacements (Pet. App. A-25; A. 135).

Thereafter, the Company adhered to its position on union security, rejecting several suggested compromises from the Union, such as an agency shop clause or a union security clause applicable only to strike replacements hired after July 1, 1977 (Pet. App. A-26; A. 162-164, 263, 280, 537-541). On December 28, 1978, a one-year agreement was finally executed effective from October 1, 1978, to September 30, 1979. It provided that "[t]here will be no compulsory Union membership required of any

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[4]On May 20, 1977, Robbins had informed the strike replacements that he had withdrawn "compulsory membership" and dues checkoff clauses in negotiations and that they had a "complete choice" whether to join the Union and pay dues (Pet. App. A-24). He repeated this unsolicited commitment to all job applicants, even after the end of the strike (Pet. App. A-25).

employees [*sic*] who was hired before October 1, 1978" (Pet. App. A-34 to A-35).

2. The Board, adopting the Administrative Law Judge's findings and conclusions, found that the Company had violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by bargaining in bad faith with no intention of reaching an agreement from May 6, 1977, until the end of the strike, and by thereafter continuing to bargain in bad faith over union security (Pet. App. A-4 to A-5, A-41).[5]

The ALJ had rejected the Company's assertions that the "severe tactics" it adopted of withdrawing previously agreed upon proposals and refusing to renew union security and checkoff provisions were required to "induce the Union to reduce its wage demands" (Pet. App. A-21 to A-22, A-32). Rather, the ALJ had found that the Company's position had been motivated by "the hope of first breaking the strike and then ousting the Union [and that] the Company's position on exempting new employees from union-security provisions was taken in bad faith, in furtherance of its union-ousting efforts" (Pet. App. A-34). Thus, the ALJ had noted that "President Robbins admitted that there had been 'excellent movement' in the * * * prestrike negotiation [on non-economic items] and also 'movement' on the part of the Union on April 28 when it reduced its initial wage

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[5]The Board also found that the economic strike was prolonged by the Company's bad faith bargaining and was converted into an unfair labor practice strike on May 6, 1977; that the Company had violated Sections 8(a)(3) and (1), 29 U.S.C. 158(a)(3) and (1), by rejecting the unfair labor practice strikers' unconditional offers to return to work and by delaying offers of reinstatement to them; and that the Company further had violated Sections 8(a)(3) and (1) by discharging three strikers for engaging in protected activity (Pet. App. A-4 to A-5, A-41 to A-42). The court of appeals upheld these findings, and the Company does not challenge them here.

requests by the amount of 54 cents an hour" (Pet. App. A-21). He also had noted that, despite Robbins' testimony that "one purpose of his bargaining tactics was to avoid protracted negotiations" (Pet. App. A-22 to A-23), Robbins admitted that he had not expected the Union to take his May 6 offer seriously (Pet. App. A-33 to A-34) and had refused to budge therefrom throughout the strike despite the Union's flexibility on wages (Pet. App. A-22). Finally, pointing to the Company's unlawful delay in reinstating the strikers, the ALJ had concluded that the Company's post-strike position on union security was a tactic to reduce further "the Union's support and bargaining strength" (Pet. App. A-35).

The Board ordered the Company, *inter alia*, to bargain in good faith with the Union upon its request (Pet. App. A-5, A-43 to A-44). The court of appeals sustained the Board's findings and enforced its order (Pet. App. A-1 to A-2).

ARGUMENT

1. Sections 8(a)(5) and (d) of the Act, 29 U.S.C. 158(a)(5) and (d), require an employer to bargain in "good faith" with the chosen representative of its employees. In determining whether an employer has met that obligation, the Board considers, among other factors, whether the employer's "conduct at the bargaining table evidences a real desire to come into agreement." *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 498 (1960); accord, *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 402 (1952) ("performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences"). See also *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 154-155 (1956) (Frankfurter, J., concurring and dissenting). Here, the Board, upheld by the court of appeals, found that the Company failed to bargain in good faith when, after the

commencement of the strike and throughout its duration, it withdrew all of its prior proposals and tentative agreements, including its wage proposal, challenged for the first time the union security clause, and met with the Union with no intention of reaching an agreement.

The Company does not appear to dispute (Pet. 15) the settled proposition that the duty to bargain "contemplates 'a willingness to enter the discussions with an open mind and purpose to reach an agreement consistent with the respective rights of the parties.' " *Dow Chemical Co.*, 216 N.L.R.B. 82, 85 (1975), quoting *NLRB* v. *Texas Coca-Cola Bottling Co.*, 365 F. 2d 321, 322 (5th Cir. 1966). Rather, it contends (Pet. 11-12) that its "hard bargaining posture" was "designed not to frustrate agreement, but to reach agreement." The Board's rejection of this view of the Company's bargaining tactics, upheld by the court of appeals, presents only an evidentiary issue that does not warrant review by this Court. *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 409-410 (1952); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. The Company's further contention (Pet. 12-13, 16) that the Board based its finding of bad faith bargaining on its view of the fairness of the Company's substantive proposals misconstrues the basis of the Board's decision. As shown in the Statement (*supra*, at 2-5, and see Pet. App. A-16 to A-26), the Board's finding of bad faith was not based on the content of the Company's proposals. The Board's finding was based on the Company's tactics of withdrawing previous proposals and tentative agreements, which, coupled with its unlawful delay in reinstating the strikers, its statements to the replacements concerning union security and its post-strike bargaining posture on that issue, demonstrated that it was not

motivated by an intent to reach agreement but by a desire to oust the Union as bargaining representative.[6]

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[6]*H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), is inapposite. There, the Court invalidated a Board order that specifically required the employer to grant the union a checkoff provision even though the employer had not agreed to such a proposal in collective bargaining. The Board's order here does not require the Company to agree to any particular contract provisions; it merely requires the Company to bargain in good faith about terms and conditions of employment (Pet. App. A-63). Moreover, in *American National Insurance Co., supra*, the Court indicated that, while insistence on a management functions clause was not a per se violation of the Act, the Board was not foreclosed from finding, in an appropriate case, that insistence on particular contract terms had been employed as a means of evading the obligation to bargain in good faith (343 U.S. at 409).

The Company's reliance on *Midwest Casting Corp.*, 194 N.L.R.B. 523 (1971), also is misplaced. There, the Board found credible the employer's assertion that it withdrew its entire proposed contract in order to "evoke a more receptive response by the Union to company proposals hitherto rejected * * *" (*id.* at 531). The Board noted that the employer's proposal was reinstated at the next bargaining session, and that the Union had been intransigent in its bargaining posture and unwilling to meet frequently during the day or for long periods at night. *Ibid.* Although the Company asserts that its situation was similar to that presented in *Midwest Casting* (Pet. 7; Pet. App. A-20, A-22), the Board, noting that the Company admitted that "excellent" progress had been made in the prestrike negotiations (Pet. App. A-21), found *Midwest Casting* to be "largely inapposite" (Pet. App. A-32).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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